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CHARLES ELMORE

NO. 579

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

INTERNATIONAL SHOE COMPANY, a Corporation,
Appellant,

vs.

STRATTON SHARTELL, Attorney-General of the State of Missouri, and C. EUGENE STEPHENS, State Treasurer of the State of Missouri,
Appellees.

Appeal from the District Court of the United States for the Western District of Missouri.

BRIEF FOR APPELLANT.

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BRIEF FOR APPELLANT.

I.

The opinion of the District Court (by a Three-Judge Court) is reported in 29 Fed. (2nd) 604.

II.

JURISDICTION.

Paragraph 1 of rule 12 has been complied with in this case, and this Court has determined that it has probable jurisdiction to hear the case.

III.

STATEMENT OF THE CASE.

This case arose under the Missouri Franchise Tax Law for the payment of annual franchise taxes.

The annual franchise tax law of the State of Misouri was enacted in 1917, and now appears as Sections 9836 to 9848, inclusive, of the Revised Statutes of Missouri, 1919. This law was amended in August, 1921, by the Legislature. The law and the amendment thereto are given in full in appendix "A" to this brief. Section 9836 of the Revised Statutes of Missouri, as amended, is as follows:

> "Sec. 9836. Annual Franchise Tax.—Every corporation organized under the laws of this state, shall, in addition to all other fees and taxes now required or paid, pay an annual franchise tax to the State of Missouri equal to one-twentieth of 1 per cent of the par value of its outstanding capital stock and surplus, or if such corporation employs a part of its capital stock in business in another state or country, then such corporation shall pay an annual franchise tax equal

to one-twentieth of 1 per cent of its outstanding capital stock and surplus employed in this state, and for the purpose of this article such corporation shall be deemed to have employed in this state that proportion of its entire outstanding capital stock and surplus that its property and assets in this state bears to all its property and assets wherever located.

"Every corporation not organized under the laws of this state, and engaged in business in this state, shall pay an annual franchise tax to the State of Missouri equal to one-twentieth of 1 per cent of the par value of its capital stock and surplus employed in business in this state, and for the purposes of this article such corporation shall be deemed to have employed in this state that proportion of its entire capital stock and surplus that its property and assets in this state bears to all its property and assets wherever located; Provided" etc.

Section 9837 prescribes the information that the corporation shall file with the Missouri Tax Commission in its annual report upon which its annual franchise tax shall be based.

Section 9838 requires the State Tax Commission to determine from the facts reported, and from any facts within or coming to its knowledge, "the proportion of the capital stock and surplus of each corporation employed in business in this state," and the amount of tax, and to report the same to the State Auditor, who shall make out a tax bill therefor and deliver it to the State Treasurer.

Section 9842 provides that the taxes and penalties shall be a first lien on the property of the taxpayer.

Section 9843 provides for penalties for failure to pay the tax.

The other sections of the law are not pertinent to further statement of the case.

In 1920 this law first came under review by the Supreme Court of Missouri, and in April of that year in the case of **State ex rel. Marquette Hotel Investment Company v. State Tax Commission**, 282 Mo. 213, the Court decided (p. 234):

> "The act before us contemplates a tax upon the right to do business in accordance with the property actually used in the business. Franchise taxes to be fair should be measured by the volume of the business. The volume can best be measured by the property used in the business."

This was reaffirmed a little later (the following October) by the Supreme Court in **State ex rel. Wabash Railway Company v. Williams**, 284 Mo. 456, and yet again July 31, 1924, in **State v. Freehold Investment Company**, 305 Mo. 88. In the latter case the Court said:

> "Section 1 (section 9836 above) clearly provided that every corporation, whether organized under the laws of this state or not, shall pay a corporation franchise tax to the extent that such corporation employs its capital and surplus in its business in this state."

In conformity with these opinions, the State Tax Commission, until the decision in February, 1928, in the Pierce Petroleum Corporation case, presently referred to, considered that the act "contemplated a tax upon the right to do business in accordance with the property actually used in the business," and assessed it upon the basis of "the property actually used by the corporation in its business" in this state. That is to say, assessed one-twentieth of one per cent of such proportion of the par value of the outstanding capital stock, plus the surplus, of par-value stock corporations as the property of such companies in Missouri bore to all of their property wherever situated; and assessed one-twentieth of one per cent of such proportion of the amount paid in for capital stock, plus the surplus of nonpar stock corporations as such corporations' property in Missouri bore to all of their property wherever located.

Prior to 1921 there was no provision in the Missouri statutes for the formation of corporations with nonpar shares of stock, and in 1921 the Missouri Legislature, at its regular session, passed what is called the Stock Corporation Act, providing for the formation under the law of Missouri of corporations with par and nonpar shares. The full text of this act is given in this brief as Appendix B.

Section 12 of that act is as follows:

"Section 12. Taxes to Be Paid—How Computed.—For the purpose of computing any organization taxes

required to be paid under the laws of this state, and such tax or taxes, if any, the determination of which is based on the par value of shares of stock and not on the number of shares or the actual or ascertained value thereof, and for the purpose of any statutory provision limiting the relation between indebtedness and capital stock, each share of stock without any nominal or par value, under the provisions of this act shall be considered the equivalent of a share having a nominal or par value of $100.00."

On February 4, 1928, the Supreme Court of Missouri, in the case of **State of Missouri v. Pierce Petroleum Corporation**, 2 (2d) S. W. 790, while expressly reaffirming the interpretation of section 9836 in the above cases of State ex rel. Marquette Hotel Investment Company v. State Tax Commission, State ex rel. Wabash Railway Company v. Williams, and State v. Freehold Investment Company, and quoting with approval the above quotation from the Marquette Hotel Investment Company case, held that this section 12, in effect, supplemented and amended section 9836 by prescribing as to nonpar stock corporations (domestic and foreign) "a basis or unit of measurement" to be used in determining "the property actually used in the business." This "basis or unit of measurement" the Court held to be the outstanding nonpar shares at $100.00 per share. That is to say, the Court held that, to measure and determine, under sections 9836 and 9838, the property "actually used in the business" by a nonpar stock corporation, the words "entire capital stock and

surplus" in said sections 9836 and 9838 should be construed to mean an amount equal to the number of such corporation's issued and outstanding shares, multiplied by $100.00 each, plus its surplus.

The International Shoe Company, conformably with Section 9837 of the Revised Statutes providing for reports and payment of franchise taxes, on form prescribed by the State Tax Commission of Missouri, made its corporation franchise tax report for the year 1928, showing the following facts (Rec., pp. 7-8):

Capital stock subscribed:		
Common	$36,082,631.09	3,760,000 shares
Preferred	10,000,000.00	100,000 shares
	$46,082,631.09	
Capital stock issued and outstanding....	$46,082,631.09	
Capital stock paid up.	46,082,631.09	
Par value of stock:		
Common	No par value	
Preferred		$100.00 per share
Paid in for each share of non-par stock....		$9.60
Surplus	$51,086,445.15	
Clear market value of property and assets in State of Missouri.	$52,956,249.12	
Clear market value of property and assets without the State of Missouri	$44,212,827.12	

7

Clear market value of total property and assets $97,129,076.24
Total value of assets in Missouri $52,956,249.12
or 54% of total property.

Based upon that report the State Tax Commission, applying the "basis or unit of measurement" of the Pierce Petroleum Corporation case, valued the 3,760,000 shares of nonpar stock at $100.00 per share, making $376,000,000.00, added thereto $10,000,000.00 for preferred stock, making total capital stock $386,000,000.00; apportioned 54 per cent to the State of Missouri, making $208,440,000.00, and assessed an annual franchise tax in the sum of $104,220.00 against the International Shoe Company for the year 1928.

The International Shoe Company, a Delaware corporation, licensed to do business in the State of Missouri, then filed its bill in the United States District Court for the Western District of Missouri to restrain the appellees, the Attorney-General and the State Treasurer of the State of Missouri, from collecting or enforcing the annual franchise tax in the sum of $104,220.00 assessed against it for the year 1928 by the Missouri Tax Commission, and to remove cloud from title to its properties cast by said tax, alleging that its capital stock and surplus were as shown by its tax return; that it owned and operated forty-three factories, twenty-four of which were located in Missouri, nine in the State of Illinois, nine in the State of New Hampshire and

one in the State of Kentucky; that the total volume of its business was two hundred and ten thousand pairs of shoes per day; that the same were sold in interstate commerce; that not more than 5¼ per cent of its annual sales were made to customers in Missouri; that during the year 1927 complainant manufactured in its factories in Missouri shoes of the value, and which were sold for, $81,424,270.67, all of which shoes were sold in interstate commerce, except shoes to the amount and value of $6,535,598.78, which were sold in Missouri; that during the same period in its factories located outside of Missouri it manufactured and sold shoes of the value of $42,882,063.16, which were sold and shipped to customers in states other than Missouri.

It was further alleged that the tax which was properly due by the International Shoe Company, under a proper construction of the act, was $26,478.12, being one-twentieth of 1 per cent of its actual capital stock and surplus employed in Missouri, or of "the property actually used by it in its business" in Missouri, and that the tax so calculated was the tax which had theretofore been held to be a proper annual franchise tax upon appellant, and that appellant had offered and still offers to pay said sum in full of its franchise taxes for the year 1928. It was further alleged by appellant that it had filed its return, as above set forth, showing the true facts incident to its property, and the value of its property and proportion of its capital stock and surplus employed in the State of Missouri, and it was alleged that the State Tax Commission,

in arriving at the annual franchise tax to be assessed against it on its capital stock and surplus employed in business in the State of Missouri, disregarded the subscribed and paid-in capital for its common no-par shares, which amounted to $36,082,631.09, but arbitrarily multiplied the number of its no-par shares issued and outstanding, 3,760,000, by $100.00 per share and valued same at $376,000,000.00, added thereto $10,000,000.00, which had been paid for its preferred shares, and thus, arbitrarily, found its capital stock to be $386,000,000.00, and allocated 54 per cent of the capital stock thus found to the State of Missouri, and valued its capital stock employed in said state at $208,440,000.00, and for the year 1928 assessed the annual franchise tax thereon at one-twentieth of 1 per cent thereof, which aggregated $104,220.00. It was alleged that the law under which said tax was assessed, and such tax, were void and unconstitutional on the following grounds: That the statutes of Missouri, under which said tax was assessed, and levied, violated the Constitutions of the United States and of the State of Missouri in the following particulars:

(1) That the tax is a burden upon and a regulation of interstate commerce, in violation of Section 8, Article I, of the United States Constitution.

(2) That the tax is, in truth and in fact, a tax on property neither located nor used in the State of Missouri, but is a tax on rights, privileges and property beyond the jurisdiction of the state; that said tax is grossly arbitrary

and confiscatory and deprives appellant of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and Section 30 of Article II of the Constitution of the State of Missouri.

(3) That the construction of Section 12 of the Stock Corporation Act as an amendment or supplement to the Corporation Annual Franchise Tax Law rendered such section void under Section 28 of Article IV of the Constitution of the State of Missouri, because the title of the Stock Corporation Act is misleading, and the subject of the act is not clearly expressed in the title, and the act contains more than one subject, in that said act, as construed by the Supreme Court of Missouri in the case of State v. Pierce Petroleum Co., Vol. 2 (2d) S. W. Rep. 790, makes it an amendment or supplement to the Annual Franchise Tax Law.

(4) That said tax violates Section 3 of Article X of the Constitution of Missouri in that said taxes are not uniform.

(5) That said tax violates Section 4 of Article X of the Constitution of the State of Missouri in that appellant's property is not taxed in proportion to its value.

(6) That said tax violates the Fourteenth Amendment to the Constitution of the United States in that it denies to appellant equal protection of the laws (Rec., pp. 1 to 37).

The answer of appellees admitted that the return of the International Shoe Company was true; that the value of the property was as therein stated; that 54 per cent of its

property was located in the State of Missouri; that the franchise tax for the year 1928 tendered to the State Treasurer was the proper amount of tax upon its capital stock and surplus actually employed in the State of Missouri under the construction of said Franchise Tax Law prior to the decision of the Supreme Court of Missouri in the case of State v. Pierce Petroleum Co., Vol. 2 (2nd) S. W. Rep. 790; but that since such decision the State Tax Commission was authorized to arbitrarily assess the tax upon the basis upon which same had been assessed (Answer of Appellees, Rec., pp. 42-47).

Hearing Before the Court.

Upon the hearing of the case before a Three Judge Court, the Court denied the preliminary injunction prayed for, and held:

That Section 12 of the Stock Corporation Act of Missouri, as an amendment to Article 9836 of the Annual Franchise Tax Law, did not violate the Constitution of the State of Missouri forbidding any law to contain more than one subject which must be clearly expressed in its title, because section 12, authorizing the computation of corporation franchise tax by placing a value of $100.00 on no-par value stock, was not a statute providing for taxes, but merely provided a method for computing taxes for corporations issuing stock without nominal or par value

and this, the Court said, was a "regulation" mentioned in the title.

That the Missouri Franchise Tax Law as construed did not deprive the International Shoe Company of its property without due process of law; that its interstate commerce was not unduly burdened; that there was no absence of uniformity in the tax, and that there was no unlawful proportion as to value, and that the International Shoe Company had not been denied the equal protection of the law.

> "That all of the above questions, save as to the effect on interstate commerce, were settled in Roberts & Schaefer Co. v. Emmerson, 271 U. S. 50, and that the tax did not burden interstate commerce" (p. 605).

It is from this decision that this case is brought before this Court for review.

ASSIGNMENTS OF ERROR URGED.

1. The Court erred in refusing to hold that said Section 12 of said Stock Corporation Act as an amendment to the said Corporation Franchise Tax Law is in contravention of the Constitution of the State of Missouri, especially section 28 of article IV, providing that no bill shall contain more than one subject, which shall be clearly expressed in its title, as in the title to said Stock Corporation Act no reference is made to corporation franchise taxes or to foreign corporations, and said Stock Corporation Act as construed contains more than one subject.

2. The Court erred in refusing to hold that Section 12 of the Stock Corporation Act of Missouri, approved April 12, 1921 (Laws of Missouri 1921, pp. 661-666) as an amendment or supplement to the Corporation Franchise Tax Law of the State of Missouri (Sections 9836 to 9848, inclusive, Revised Statutes of Missouri, 1919, as amended by the act approved August 4, 1921, and appearing in the Laws of Missouri, Extra Session 1921, pp. 121-126, inclusive), and said Corporation Franchise Tax Law as so supplemented and amended are in contravention of the Constitution of the United States, especially of the Interstate Commerce clause of Section 8, Article I, and of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

3. The Court erred in refusing to hold that Section 12 of the Stock Corporation Act of Missouri (Laws of Mis-

souri 1921, pp. 661-666) as interpreted and construed by the Supreme Court of Missouri in State v. Pierce Petroleum Corporation, 2 (2d) S. W. 790, in so far as it relates to the assessment of franchise taxes, is unconstitutional and void because it violates the Fourteenth Amendment of the Constitution of the United States in that in its effect and practical operation it imposes upon appellant a franchise tax that denies appellant the equal protection of the law, and that is confiscatory and taxes appellant's property without the State of Missouri, thereby depriving appellant of its property without due process of law.

4. The Court erred in refusing to hold that said section 12 as interpreted and construed in said case of State v. Pierce Petroleum Corporation, in so far as it relates to the assessment of corporation franchise taxes, is unconstitutional and void because it violates Section 8 of Article I of the Constitution of the United States in that it imposes upon appellant a tax that burdens appellant's interstate commerce.

5. The Court erred in refusing to hold that Section 9836 of the Corporation Franchise Tax Law of Missouri (Laws of Missouri 1921, Extra Session, pp. 121-126) as amended and supplemented by Section 12 of the Stock Corporation Act as interpreted and construed in said case of State v. Pierce Petroleum Corporation is unconstitutional and void because it violates the Fourteenth Amendment of the Con-

stitution of the United States in that in its effect and practical operation it imposes upon appellant a franchise tax that denies appellant the equal protection of the law and that is confiscatory and taxes appellant's property without the State of Missouri, thereby depriving appellant of its property without due process of law.

6. That the said assessment for franchise taxes made by the said State Tax Commission, and the tax bill as made out by the State Auditor of the State of Missouri against appellant for the sum of $104,220.00, was not upon the true valuation in money, or the par value, of the proportion of appellant's capital stock and surplus employed in business in the State of Missouri, or upon any estimate of the value of the proportion of appellant's properties in the State of Missouri, but altogether upon the basis of other considerations, to wit, an arbitrary or fictitious value of appellant's capital stock arrived at by multiplying the number of shares of its capital stock issued and outstanding (3,760,000) by $100.00 per share, making a total of $376,000,000.00, and apportioning 54 per cent, or $208,440,000.00, to the State of Missouri as the amount of capital stock and surplus employed in its business by appellant in said state, and figuring the franchise tax at one-twentieth of one per cent thereof, or $104,220.00, claiming and pretending that said sum so assessed represents the proportion of appellant's capital stock and surplus employed within the State of Missouri, whereas said sum

bears no relation to the true value of appellant's capital stock and surplus employed within said state, as its entire capital stock is $46,082,631.09, and its surplus is $52,956,-249.12, making a total of $97,169,076.24, and the proportion employed in the State of Missouri is 54 per cent, or $52,-956,249.12; one-twentieth of one per cent of said amount is $26,478.12, and said franchise tax of $104,220.00 so assessed is nothing but an arbitrary assessment of a tax based on a fictitious or arbitrary value of appellant's capital stock and surplus, apportioning 54 per cent of such fictitious value to Missouri, without any reference whatever to the actual amount or value of capital stock and surplus employed by appellant in its business in the State of Missouri, and the Court erred in not so holding.

7. The Court erred in holding that the question of due process of law, absence of uniformity, taxation in proportion to value and equal protection of the law had been settled in Roberts & Schaefer Co. v. Emmerson, 271 U. S. 50, and other decisions.

SUMMARY OF ARGUMENT.

I.

The Missouri Act violates Section 28, Article IV, of the Missouri Constitution.

Southard v. Short, 8 (2nd) S. W. 903.

II.

This Court has not heretofore had occasion to consider a franchise tax law which, in its terms and in its construction by the highest court of the state, is the same as the Franchise Tax Law here in question.

III.

The construction of the statute by the highest court of the state is a part of the statute as effectively as if it had been written therein and adopted by the Legislature.

Thornton v. Duffy, 254 U. S. 361;
Douglas v. County of Pike, 101 U. S., l. c. 686.

IV.

The Missouri Franchise Tax Law, as construed by the highest court of the state, contemplates a tax "in accordance with the property actually used in the business" in this state.

Marquette Hotel Investment Co. v. State Tax Commission, 282 Mo. 213;

State ex rel. Wabash Railway Co. v. Williams, 284 Mo. 456;
State v. Freehold Investment Co., 305 Mo. 88;
State v. Pierce Petroleum Corporation, 2 (2d) S. W. 790, l. c. 795.

V.

The "basis or unit of measurement" prescribed by Section 12 of the Non-Par Stock Corporation Act of Missouri, as interpreted in State v. Pierce Petroleum Corporation, is arbitrary, fictitious and false, and does not either actually or presumptively determine "the capital stock and surplus employed in business in this state," or "the property actually used in the business" in the state.

VI.

Said "basis or unit of measurement" denies the equal protection of the law, in violation of the Fourteenth Amendment to the Federal Constitution.

Air-Way Electric Appliance Corporation v. Day, 266 U. S. 71;
Southern R. Co. v. Green, 216 U. S. 400;
People ex rel. Terminal and Town Taxi Company v. Walsh, 202 App. Div. (New York) 651;
Roberts & Schaeffer Co. v. Emmerson, 271 U. S. 50;
O'Gara Coal Co. v. Emmerson, 326 Ill. 18;
In re Thermiodyne Radio Corporation, 26 (2d) Fed. Rep. 716;
Staples v. Kirby Petroleum Co., 250 S. W. 293;
General Corporation Laws of Delaware.

VII.

Said "basis or unit of measurement" in its effect and necessary operation burdens interstate commerce, in contravention of the commerce clause of the Federal Constitution.

Western Union Telegraph Co. v. Kansas, 216 U. S. 1;
Ludwig v. Western Union Telegraph Co., 216 U. S. 146;
International Text Book Co. v. Pigg, 217 U. S. 91;
Atchison, Topeka & Santa Fe R. Co. v. O'Connor, 223 U. S. 280;
Looney v. Crane Co., 245 U. S. 178;
International Paper Co. v. Mass., 246 U. S. 135;
Air-Way Electric Appliance Corporation v. Day, 266 U. S. 71;
Alpha Portland Cement Co. v. Mass., 268 U. S. 203;
Baltic Mining Co. v. Mass., 231 U. S. 68;
Locomobile Co. v. Mass., 246 U. S. 146;
O'Gara Coal Co. v. Emmerson, 326 Ill. 18, l. c. 32;
Cudahy Packing Co. v. Hinkle, No. 278, decided February 18, 1929.

VIII.

Said "basis or unit of measurement" by its effect and necessary operation imposes a tax upon property outside the confines of the state, in violation of the due-process clause of the Fourteenth Amendment.

See cases last above cited.

IX.

Said "basis or unit of measurement" results in a tax that is arbitrary, excessive and confiscatory, and has no relation whatever to the value of the franchise charged for or to the "capital stock and surplus employed in business in this state," or to "the property actually used in business in Missouri," and, therefore, violates the due-process clause of the Fourteenth Amendment.

Ozark Pipe Line Corporation v. Monier, 266 U. S. 555, at 562, 568;

Maine v. Grand Trunk R. Co., 142 U. S. 217;

Roberts & Schaeffer v. Emmerson, 271 U. S. 50, l. c. 57;

Air-Way Electric Appliance Corporation v. Day, 266 U. S. 71, l. c. 83;

Pembina Consolidated Silver Min. and M. Co. v. Penn., 125 U. S. 181;

Union Tank Line Co. v. Wright, 249 U. S. 275, l. c. 282;

Postal Telegraph & Cable Co. v. Adams, 155 U. S. 688;

St. Louis & Southwestern Railway Co. v. Arkansas, 235 U. S. 350;

State v. Williams, 284 Mo. 456;

Dane v. Jackson, 256 U. S. 589, l. c. 599;

Henderson Bridge Co. v. Henderson, 173 U. S. 592, l. c. 615;

Southern R. Co. v. Kentucky, 274 U. S. 76;

People ex rel. Commercial Cable Co. v. Morgan, 178 New York 433;

O'Gara Coal Co. v. Emmerson, 326 Ill. 18.

ARGUMENT.

In the case of **State v. Pierce Petroleum Co., 2 S. W. (2nd) 790,** the Supreme Court of Missouri held that Section 12 of the Stock Corporation Act of 1921 provided a new method for computing the franchise tax of nonpar stock corporations, both domestic and foreign, and was to that extent an amendment to the franchise tax law.

The title of the Stock Corporation Act passed by the Missouri Legislature in 1921 does not purport an amendment to the franchise tax law in any particular, and makes no reference whatever to franchise taxes or the computation of same, but purports solely to be an amendment to the Stock Corporation Act, provides for the organization and formation of corporations having both preferred and common shares without nominal or par value, and regulating the same. Section 12 of such act, if it be an amendment to the Franchise Tax law, is unconstitutional.

Section 28 of Article IV of the Missouri Constitution provides:

> "Bills must contain but one subject—exceptions—title.—No bill (except general appropriation bills, which may embrace the various subjects and accounts for and on account of which moneys are appropriated, and except bills passed under the third subdivision of section 44 of this article) shall contain more than one subject, which shall be clearly expressed in its title."

Section 44 of Article IV of the Constitution is in reference to the raising of revenue and not in reference to other bills.

The Supreme Court of Missouri has had occasion to consider the question of title, and has expressly held that where a bill is passed where the title does not comply with the provisions of article IV, section 28, it is unconstitutional (Southard v. Short, 8 S. W. Rep [2nd Series] 903, Missouri Supreme Court).

There has been filed in this court a brief and argument by Hon. John F. Green of the St. Louis bar, amicus curiae, on behalf of a number of other corporations. In order to prevent a duplication of argument and authorities, appellant adopts that brief as further argument upon this one question.

In 1920 the Franchise Tax Law of Missouri, and its construction, first came under review by the Supreme Court of Missouri, and that court, in the case of **State ex rel. Marquette Hotel Investment Company v. State Tax Commission**, 282 Mo. 213, says (p. 224):

> "Unequal taxes may not be imposed upon property of the same kind in the same condition and used for the same purposes" (citing and quoting Guthrie on Fourteenth Amendment).

And further (p. 225):

> "If, therefore, each of two corporations uses in its business the same amount of outstanding capital

stock and the same amount of other assets, each is using its franchise to the same extent. And it is therefore reasonable to assume that these franchises are of equal value. Each should therefore pay an equal amount of taxes."

And, finally (p. 234):

"The act before us contemplates a tax upon the right to do business in accordance with the property actually used in the business. Franchise taxes to be fair should be measured by the volume of the business. The volume can best be measured by the property used in the business."

This construction was reaffirmed by the same Court in **State ex rel. Wabash Railway Co. v. Williams, 284 Mo. 456; State v. Freehold Investment Company, 305 Mo. 88,** and **State v. Pierce Petroleum Corporation, 2 (2d) S. W. 790.**

In the case of **State ex rel. Standard Tank Car Co. v. Sullivan, 282 Mo. 261,** which was decided at a time when Missouri had no law providing for the incorporation of a corporation having shares of no par stock, the Court held:

"Though the common stock of a foreign corporation has no stated par value, it can be taxed in this state on the proportion of the capital stock represented by its business therein to the whole amount as required by Section 3039, Revised Statutes 1909, so that a license cannot be refused to such corporation under Section 3334, Revised Statutes 1909."

There is no question about the fact, therefore, that the Missouri Franchise Tax Law (Section 9836, Section 9838) means that corporations, domestic and foreign, par value and nonpar value, shall pay annual franchise taxes "in accordance with the property actually used in the business," in the state. Such is the construction of the law by the Supreme Court of Missouri, and that construction is as much a part of the statute as if it had been written therein and adopted by the Legislature (**Thornton v. Duffy, 254 U. S. 361; Douglas v. County of Pike, 101 U. S., l. c. 686**). As to corporations having par-value stock, the par value of its outstanding capital stock plus its surplus is taken as the basis by which to determine the property of the company "actually used in its business" in the state. As to corporations having stock without par value, the amount actually received by the corporations for its outstanding stock, plus its surplus, until the Pierce Oil Corporation decision, was taken as the basis by which to determine the property of such corporations "actually used in the business" in Missouri. To consider the capital stock of a par-value corporation to be in amount the par value of its issued stock is not only a rule of convenience, avoiding the possibility of dispute, but is a reasonable basis, because ordinarily, as common experience teaches, the par value of issued stock fairly represents the value of the capital stock. The fact that there has never been objection raised by any corporation to so measuring its capital stock is proof conclusive, if proof were needed,

that the assumption is a fair one. Such has been the construction and such the administration of the Franchise Tax Law of Missouri until the Pierce Petroleum decision. No difficulty was ever experienced in its administration, that is to say, in determining "the property actually used in the business" in the state, either as to par value or nonpar value corporations. As is observed in the Freehold Investment Company case (305 Mo. 88), it is no more difficult to determine "the property actually used in the business" in the state by a nonpar stock corporation than it is to determine the surplus of par value stock corporations.

We would emphasize the fact that the decision of the Supreme Court of Missouri (February, 1928) in State v. Pierce Petroleum Corporation, does not depart from its foregoing construction of the Franchise Tax Law. Indeed, it quotes with approval the above-quoted construction from the Marquette Hotel Investment Company case (282 Mo., l. c. 234). Our criticism is of "the basis or unit of measurement," which the decision finds in Section 12 of the Stock Corporation Act to be used in determining "the property actually used in the business" by foreign nonpar stock corporations. It is this "basis or unit of measurement" with respect to such corporations prescribed by section 12, as interpreted in the Pierce Petroleum case, which we contend renders the tax unconstitutional and void. That "basis or unit of measurement" as to such corporations is this: $100.00 per outstanding nonpar share shall, in all cases, be deemed to be the capital stock in computing the

franchise tax. In this respect the Court held that Section 12 of the Stock Corporation Act in effect supplemented and amended Section 9836 of the Franchise Tax Law.

It is manifest that this "basis or unit of measurement" is purely fictitious—indeed, the Court itself says that it is "an arbitrary valuation" (l. c. 794)—in all cases where the stock has been issued for less than $100.00 per share, and that its application does not either actually or presumptively disclose "the property actually used in the business" in the state; but in every case where, as here, the corporation has received but a small amount for its outstanding nonpar shares, results in a tax so ruthless, oppressive and confiscatory as to shock one's conception of common right and justice.

This Court has held in the **Airway** case (266 U. S. 71) that the number of shares of stock of a corporation which are authorized but not issued is not a reasonable measure of the fee which may be imposed upon it for the privilege of doing business in the state.

Section 12 of the Stock Corporation Act of 1921 does not attempt to provide for the annual franchise taxes of foreign corporations. It says:

> "For the purpose of computing any organization taxes required to be paid under the laws of this state, and such tax or taxes, if any, the determination of which is based on the par value of shares of stock and not on the number of shares or actual or ascer-

> tained value thereof * * * each share of stock without any nominal or par value, under the provisions of this act, shall be considered the equivalent of a share having a nominal or par value of $100.00."

The provisions of that act were solely for the incorporation in Missouri of corporations having nonpar shares, as well as par shares, and the regulation thereof. It had no relation whatever to foreign corporations.

Section 9836 relating to franchise taxes, in reference to foreign corporations, provides:

> "Every corporation not organized under the laws of this state, and engaged in business in this state, shall pay an annual franchise tax to the State of Missouri equal to one-twentieth of 1 per cent of the par value of its capital stock and surplus employed in business in this state, and for the purposes of this article such corporation shall be deemed to have employed in this state that proportion of its entire capital stock and surplus that its property and assets in this state bears to all its property and assets wherever located."

The proportion of the capital stock and surplus employed in business in the State of Missouri under the above definition is easily ascertainable. The par value of its capital stock and surplus is easily ascertainable.

There is no suggestion in the law that the number of shares of stock issued by a corporation shall have any relation whatsoever to the franchise tax assessed against it,

and as this Court has said, no state can require a foreign corporation to pay upon its entire capital stock in order to obtain the privilege of doing business. If, for the privilege of doing business in a foreign state, its entire capital stock cannot be the basis of a franchise tax, then upon what theory can 54 per cent of its capital stock be valued at double its capital stock and surplus for franchise tax purposes? To state the proposition answers it.

Not until the Stock Corporation Law of Missouri had been on the statute books seven years did the State Tax Commission discover, in Section 12 of the Stock Corporation Act, the possibility of establishing a new basis for the imposition and collection of annual franchise taxes on foreign nonpar stock corporations.

Under the decision in State v. Pierce the corporate share structure and not "the capital stock and surplus used in Missouri," or "the property actually used in the business" in Missouri, controls the tax. To illustrate, if the corporation has 460,000 shares of par value stock with the same capital and surplus as the International Shoe Company, and employs the same proportion in Missouri, then its tax is $26,478.12. If, in its corporate structure it has issued 460,000 shares of no-par stock with the same capital and surplus of the International Shoe Company, and uses the same per cent in the State of Missouri, then its franchise tax is $26,478.12. If, on the other hand, in its corporate structure it has 46,000 shares of no-par stock and its capital is the same as the capital and surplus

of the International Shoe Company, and it employs 54 per cent of its assets in the State of Missouri, then its franchise tax is $2,647.81.

This shows, that under the construction of section 12 by the Supreme Court in the Pierce Petroleum case the franchise tax as assessed is arbitrary, confiscatory, burdens interstate commerce, taxes property beyond the jurisdiction, and deprives appellant of its property without due process of law.

In the Pierce Petroleum case, however, all constitutional points in the case were left open, as the Court says in the concluding paragraph of its opinion (2 S. W. [2nd], loc. cit. 795):

> "In conclusion it should be said that it is not contended, nor does it appear, that the method provided by the statute for computing the franchise tax of corporations such as respondent, is confiscatory in effect, or that it operates to impose a tax upon property outside the state, or that it effects a burden on interstate commerce."

This Court, in **Airway Electric Appliance Corp. v. Day**, 266 U. S. 71, at page 89, says:

> "The act in its practical operation does not require like fees for equal privileges by foreign corporations in Ohio under the same circumstances. Unless by the laws of the state where organized they chance to be authorized to issue the same number of nonpar value

shares, the annual franchise fee imposed on foreign corporations having the same amount of property and business and exercising the same privileges in Ohio, will not be the same; and the charge imposed upon one may be many times that made against the other. * * * It is clear that the mere number of authorized nonpar value shares is not a reasonable basis for the classification of foreign corporations for the purpose of determining the amount of such annual fees. Such classification is not based on anything having relation to the purpose for which it is made. The act has no tendency to produce equality, and it is of such a character that there is no presumption that substantial equality will result from its application."

At page 82 the Court said:

"The inevitable effect of the act is to tax and directly burden interstate commerce of foreign corporations permitted to do business in Ohio and engaged in interstate commerce wherever the number of shares authorized subject to the charge of five cents each exceeds the number of outstanding shares attributable to or represented by the corporation's property and business in that state * * * and that it necessarily amounts to a tax and direct burden upon all the property and business, including the interstate commerce of the plaintiff."

This Court held the same in effect in the cases of Alpha Portland Cement Co. v. Commonwealth of Mass., 268 U. S. 203; Baltic Mining Co. v. Commonwealth of Mass. and

Locomobile Co. of Amer. v. Commonwealth of Mass., 246 U. S. 146. This Court has recently applied the same principles in the case of Cudahy Packing Company v. Hinkle, No. 278, October Term, 1928, decided February 28, 1929.

This Court, in the case of **Looney v. Crane, 245 U. S. 178**, held:

> "The imposition of a state tax as a condition of admitting a foreign corporation engaged in interstate commerce to do business in the state based upon the amount of its authorized capital stock and of a **franchise tax** based upon the capital, surplus and undivided profits, constitutes an unlawful burden upon interstate commerce."

In the case of **Staples v. Kirby Petroleum Co., 250 S. W. 293**, the Texas Court, in reference to the provisions of the Delaware Statute fixing a value of $100.00 per share for nonpar shares for the purpose of fanchise taxation of corporations organized under the laws of Delaware, says:

> "It is only that part of a statute under which a charter is granted which grants or restricts the powers of the corporation that becomes a part of the charter. The Delaware statute, in that portion cited in this opinion, does neither. It related only to the question of taxation—a matter of which the State of Delaware has no interest in other states. For this reason alone it must be presumed that it was not intended to have extra-territorial force. But we are not left to conjecture in this matter. It is expressly limited to

'franchise taxes prescribed to be paid by corporations to this state (Delaware), and for no other purpose.' There is another reason why the law of the state granting the charter should not be applied in this state, in so far as it fixes the value of nonpar shares for taxing purposes in such state. Delaware fixes such value at $100.00 each. Suppose New York should fix such value for such purposes at $50.00 and New Jersey should fix the same at $10.00—the result of enforcing such laws in this state would be that, instead of corporations paying in proportion to their capital stock, as is contemplated by our statute, different corporations, chartered under the laws of different states, would be taxed unequally, contrary to the letter and spirit of the Constitution and laws of this state."

While it is true that this Court, in the case of **Roberts & Schaefer Co. v. Emmerson, 271 U. S. 150,** held that the State of Illinois could tax a domestic corporation a franchise tax based upon $100.00 per share for nonpar shares of stock, that holding was expressly based upon the proposition that the domestic corporation had acquired from the State of Illinois its charter and corporate existence, including the legal incidents and practical uses attaching to the issuance of nonpar value stock; hence, the state had a right in its legislation to require a corporation which should accept the benefits thereof, to pay a tax based upon such legislation.

The Supreme Court of Illinois, however, subsequent to the decision in the Roberts & Schaefer case, in passing

upon the validity of that statute as to foreign corporations, in the case of **O'Gara Coal Co. v. Emmerson,** 326 Ill. 18, at page 36, says:

> "Any system of taxation must have for its basis some standard of value. It may be the amount of business transacted, the amount invested in business, net profits or other standard capable of measurement in money. It is the province of the Legislature to determine the standard. If it is the amount of capital, the amount must be reducible in some way to terms of money, and it must be fixed with some regard to value, whether par value, issue price, market value, or value determined in some other manner and not by an arbitrary valuation at a set figure, whether $100.00, $5.00, or $500.00. There is no universal or generally prevalent law or custom which establishes the value of shares of stock of no-par value at any certain figure, and a law of one state which indicates that for purpose of taxation the shares of stock of foreign corporations having no par value shall be regarded as of a definite, specific value, is arbitrary, discriminatory and denies due process of law and the equal protection of the law. The terms of the General Corporation Act which provides that in the event that the corporation has stock of no-par value, its shares, for the purpose of fixing fees, shall be considered to be of the par value of $100.00 per share, are, therefore, discriminatory between foreign corporations having shares of stock of no-par value issued at different prices and in different amounts."

Again, page 47:

> "The number of shares into which the capital stock of foreign corporations may be divided is not a reasonable basis for classification of such corporations for the purpose of determining the amount either of the initial fee for a certificate of authority to do business in Illinois, or of the annual franchise tax, and, therefore, an arbitrary valuation of the capital stock of no-par value of such corporations at $100.00 a share, or any other definite amount a share, without reference to par value, sale price, market price, or any consideration other than number of shares, renders such classification discriminatory against corporations which have issued such stock at prices less than $100.00 a share, and denies to them due process of law and the equal protection of the laws."

In the State of New York, where the Franchise Tax Law provided "if such a corporation (foreign) has stock without par value, then the basis of the tax shall be such proportion of its paid-in capital as its real and tangible personal property in this state bears to its entirely real and tangible personal property." As to this provision the New York court held:

> "This was an entirely reasonable provision which imposed a tax which would bear equally upon all foreign corporations."

A new section was enacted providing:

> "If such corporation has stock without par value, then the basis of the tax shall be such a portion of its

issued capital stock as its gross assets employed in this state bear to the entire gross assets employed in its business, and its shares without par value shall be deemed to have a face value of $100.00 each, for the purpose of assessment."

As to the amendment, the Court, in **People ex rel. Terminal and Town Taxi Company v. Walsh**, 202 App. Div. (N. Y.) 651, says:

"The compulsory value of $100.00 required by the provisions as thus construed, to be placed upon every share of no-par value stock is entirely arbitrary and necessarily would result in unequal taxation. It would require corporations having issued stock of the actual value of $5.00 per share to pay the same tax per share as corporations having issued stock the shares of which were, in fact, worth $4,000.00 per share. It might have the result of compelling corporations employing in this state a capital of only $1,000.00 to pay for the privilege of doing their limited business the same tax as corporations employing within the state capital of $200,000.00. The words above quoted from the opinion of Judge Vann in the Mensching case, apply with equal force to the tax sought to be imposed in the case at bar under the provisions quoted from Section 2147 of the Tax Law and compel the conclusion that the provision is unconstitutional."

In the case of **In re Thermiodyne Radio Corporation, 26 Fed. (2nd) 716**, the District Court of Delaware held that a tax on a foreign corporation of a specified amount on

each share of no-par value capital stock for franchise tax purposes imposed by the tax law of New York was lacking in equality within the equal-protection clause of the United States Constitution, in the Fourteenth Amendment. That case was affirmed by the Circuit Court of Appeals for the Third Circuit in an opinion not yet officially reported, and this Court now has before it the determination of that case.

The line of demarkation separating foreign corporations that are without the equal-protection clause from those that come within it, is clearly set forth in this Court's opinion in the case of **Hanover Fire Ins. Co. v. Carr, 272 U. S. 494.**

It is true that a state may require certain things of a foreign corporation in order to engage in business within that state, but there is a very important qualification to such power, and that qualification is that the state may not exact, as a condition of the corporation engaging in business within its limits, that its rights secured by the Constitution of the United States be surrendered. This is illustrated by the law passed by the State of Arkansas which provided that the license of a foreign corporation should be revoked for exercising its constitutional right to remove a suit brought against it from the State Court to the Federal Court.

This Court, in **Terrell v. Burke Construction Co., 257 U. S. 529,** held that such law was unconstitutional. Likewise this Court has held that where a statute attempts to

subject foreign corporations to the payment of a tax which is a tax not only on the property of a corporation within the state, but also on its property without the state, that same is in violation of the due-process clause of the Fourteenth Amendment **(Western Union Telegraph Co. v. Kansas, 216 U. S. 1; St. Louis Cotton Compress Co. v. Arkansas, 260 U. S. 346).**

In the instant case the International Shoe Company came into the State of Missouri prior to the enactment of the Law of 1921 as to stock corporations and has established therein a business of a permanent character, requiring for its prosecution a large amount of fixed and permanent property, which it has acquired under the sanction and permission of the laws of Missouri, and it is, therefore, entitled to protection against the imposition of an unreasonable and confiscatory tax under the Fourteenth Amendment to the Constitution.

The franchise tax under the laws of Missouri is not the sole tax upon a foreign corporation engaging in business in such state, but its general property taxes and other state taxes are the same as are paid by other persons on property and business in the state; and appellant has paid, as averred in the bill, ad valorem taxes of $69,775.00; manufacturers' license tax $67,889.15 and merchants' license taxes $59,703.78. In addition, the state is demanding an additional tax of $104,220.00 solely for the privilege of using its property in corporate form in Missouri.

The annual franchise tax cannot be a tax upon appellant's right to issue no-par stock, for this right was

granted by the State of Delaware, in which it was incorporated, and the State of Missouri cannot enlarge or restrict its powers as to the issuance of such no-par shares. This was held in **Airway Electric Appliance Corp. v. Day, 266 U. S., at page 83.**

The one and only privilege conferred by the State of Missouri to such a foreign corporation for which it may exact a charge called a franchise tax is the right to carry on its business in corporate form within the state (**Pembina Consol. Silver Min. & M. Co. v. Penn., 125 U. S. 181,** and the Air-Way case just cited). The case, therefore, must be distinguished from Roberts & Schaeffer v. Emmerson, which, of course, had to do with a franchise tax upon a domestic non-par stock company, with all of its property and business within the State of Illinois.

The charge for this privilege surely may not be arbitrary or confiscatory in amount. There must be some limit. It must be a reasonable charge. While we do not contend that it must be a **precise** equivalent for the value of the privilege for which the charge is made, yet it surely must take into consideration the value of that privilege and bear some reasonable relation thereto. As was said in the **Air-Way** case **(261 U. S. at p. 83)**:

> "Without holding that such a charge must be measured by the value of the privilege for which it is imposed, it may be said that some relation to such value is a reasonable requirement."

So in **Maine v. Grand Trunk R. Co., 142 U. S. 217:**

> "The whole field of inquiry into the extent of revenue from sources at the command of the corporation is open to the consideration of the state in determining what may be justly exacted for the privilege."

Ordinarily franchise tax statutes prescribe formulae, or, in the language of Pierce Petroleum Corporation case, "bases or units of measurement" for determining the tax. Different formulae will be found in different states, but the purpose of all is to arrive at a tax reasonable in amount and that will fall with approximate **equality** on corporations similarly circumstanced.

In **Union Tank Line Co. v. Wright, 246 U. S. 275, l. c. 282,** this Court said:

> "If the plan pursued is arbitrary, and the consequent valuation grossly excessive, it must be condemned because in conflict with the commerce clause or the Fourteenth Amendment, or both."

In **Postal Telegraph and Cable Co. v. Adams, 155 U. S. 688,** this Court had under consideration the franchise tax of Massachusetts imposed upon a foreign corporation in lieu of other taxes. The Court said (p. 695):

> "But property in the state belonging to a corporation, whether foreign or domestic, may be taxed or a tax may be imposed on the corporation on account of its property within the state, and may take the

> form of a tax for the privilege of exercising its franchise within the state, if the ascertainment of the amount is made dependent in fact on the value of its property situated within the state, the exaction therefor not being susceptible of exceeding the sum which might be leviable directly thereon."

This language was quoted with approval in St. Louis and Southwestern Railway Co. v. Arkansas, 235 U. S. 350, and was also quoted, approved and applied by the Supreme Court of Missouri in State v. Williams, 284 Mo. 456.

If a franchise tax in lieu of ad valorem and all other taxes may not exceed in amount the just equivalent of such taxes, surely when it is imposed in addition to the ad valorem tax, its amount may not exceed the ad valorem tax.

If the amount here demanded does not, because of the arbitrary manner in which it is assessed and its confiscatory size, take appellant's property without due process, then how arbitrary and large would the tax have to be to do so? If the "basis or unit of measurement" prescribed by section 12, as interpreted by the Pierce Petroleum case, is to be upheld, then why limit the fictitious value of the non-par shares to $100.00 per share when, by providing that they should be valued at $200.00 per share, appellant's capital stock would be increased to $754,000,000? Or, on the other hand, why not reduce appellant's capital to $103,000,000.00 by providing that the non-par shares should be considered at $25.00 a share, or to $3,760,000.00, by pro-

viding that the non-par shares should be considered of the value of $1.00 per share. Why fix $100.00 per share? There is no requirement in the law of Missouri (to say nothing of the varying laws in the other states) that par value stock shall be $100.00 per share, or any other amount, and, we dare say, that lawyers with wide experience in corporate affairs in that state will agree that there are as many corporations organized in Missouri with par-value stock of $50.00 and of $25.00 as there are with par-value stock of $100.00 per share, and that a great many have shares of $10.00 and of $1.00 par value.

Is it not manifest that the trouble with the "basis or unit measurement" of Section 12, as interpreted by the Pierce Petroleum case, is that it is purely fictitious and results in fixing the franchise tax without the slightest honest reference to "the property actually used in the business" in the state and, therefore, without the slightest reference to the value of the privilege granted and for which the charge is made? Indeed it would be difficult to conceive of a formula, or a basis, or a rule, by which to fix a franchise tax to be paid by foreign nonpar stock corporations that is more arbitrary, or more indifferent to the actual conditions, or that more utterly ignores "the property actually used in the business" in the state.

In **St. Louis, Southwestern Railway Company v. Arkansas, 235 U. S. 350**, the franchise tax statute of Arkansas fixing the tax at one-twentieth of one per cent of "the proportion of the outstanding capital stock of the corpora-

tion represented by property owned and used in business transacted in this state" was upheld on the ground that (p. 364):

> "* * * and we have no hesitancy in overruling the contention that the tax is repugnant to the due process clause on the ground of being in effect based on property located beyond the limits of the state; for this tax is measured by reference to property situated wholly within the confines of the state."

And again (p. 365) the Court said:

> "Applying these principles, we have no difficulty in sustaining the tax in question as a legitimate imposition upon a foreign corporation with respect to its exercise of the privilege of transacting intrastate business in corporate form, the tax being based upon the amount and value of its property within the state."

In **Southern R. Co. v. Kentucky, 274 U. S. 76, p. 83**, this Court has said:

> "But if the method used in valuing property within the state is arbitrary, and the resulting valuation is grossly excessive, the tax (in this case, franchise tax) must be condemned as in contravention of the due process clause of the Fourteenth Amendment."

In the instant case the tax is not measured by reference to "property situated wholly within the confines of the

state," nor is it "based upon the amount and value of the property within the state," but is based upon an arbitrary, exorbitant and purely fictitious amount falsely called appellant's capital stock, and the necessary result is an arbitrary and excessive tax, or, as said in **Dane v. Jackson**, 256 U. S. 589, l. c. 599, a tax resulting in "such flagrant and palpable inequality between the burden imposed and the benefit received as to amount to arbitrary taking of property without compensation."

Again, to use the language of this Court, in **Henderson Bridge Co. v. Henderson, 173 U. S. 592**, at page 615, there is here attempted "spoliation under the guise of asserting the power to tax."

Counsel are not unmindful of this Court's decision in the case of Roberts & Schaefer v. Emmerson, 271 U. S. 50, but in that case the sole question was the right of a state to prescribe its own rule for franchise taxes for domestic corporations with nonpar stock; nor are counsel unmindful of this Court's opinion in the case of Margay Oil Co. v. Applegate, 273 U. S. 666, but in that case this Court, without opinion, affirmed the decision of the Supreme Court of Arkansas, which appears in 269 S. W., at page 63, which held the basis of the franchise tax was fair and just. The affirmance of that decision by this Court did not mean a state could impose a basis for the valuation of capital stock for franchise tax purposes that would be confiscatory or unjust or burden interstate commerce.

The Arkansas law passed upon provides that no-par shares for franchise tax purposes shall be valued at $25.00 per share, and the tax is based upon the capital stock of the corporation alone. **No tax is imposed upon the surplus.** The Illinois statute which was passed upon based taxation **on capital stock ALONE. The Missouri law bases its tax upon capital stock and surplus.** The International Shoe Company has a surplus of over $51,000,000.00 in addition to its capital stock. It can thus be readily seen that valuing its no-par shares at $100.00 per share, adding thereto its par shares of $10,000,000.00 and its surplus of $51,000,000.00, and then apportioning 54 per cent of such amount to the State of Missouri as the part of capital stock and surplus employed or "the property actually used in its business" in such state, results in an absurdity; also the Supreme Court of Missouri has held in all cases decided that the Missouri Act "contemplates a tax upon the right to do business **in accordance with the property actually used in the business"** in the state. Upon what theory can the Court say that fifty-two millions of dollars of property represents $208,440,000.00 for franchise tax purposes?

It is respectfully submitted that the "basis or unit of measurement" prescribed by Section 12 of the Stock Corporation Act of Missouri, as that section is interpreted by the Supreme Court of that state in the Pierce Petroleum Corporation case, is wickedly arbitrary in its effect and practical operation; is a fictitious and false "unit or basis of measurement" laid down without the slightest reference

to the amount or the value of the foreign corporation's true capital stock, or its property within the state, or its business, and does not truly determine or even measurably approximate "the property actually used in the business" in the state; that it denies the equal protection of the laws, burdens interstate commerce, taxes property beyond the domain of the state and, in all cases where, as here, but a small sum per share has been received for the issued non-par shares, imposes a tax bearing no relation whatever to the value of the privilege for which the charge is made, and is so ruthless, exorbitant and confiscatory as to shock one's conception of right and justice.

Respectfully submitted,

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APPENDIX A.

Corporation Annual Franchise Tax Law

(omitting unnecessary sections).

(Rev. St. Mo. 1919, Secs. 9836 to 9848, incl., as Amended Laws 1921, Ex. Session, pp. 122-126.)

Sec. 9836. **Annual Franchise Tax.**—Every corporation organized under the laws of this state, shall, in addition to all other fees and taxes now required or paid, pay an annual franchise tax to the State of Missouri equal to one-twentieth of one per cent of the par value of its outstanding capital stock and surplus, or if such corporation employs a part of its capital stock in business in another state or country, then such corporation shall pay an annual franchise tax equal to one-twentieth of one per cent of its outstanding capital stock and surplus employed in this state, and for the purposes of this article such corporation shall be deemed to have employed in this state that proportion of its entire outstanding capital stock and surplus that its property and assets in this state bears to all its property and assets wherever located. **Every corporation not organized under the laws of this state, and engaged in business in this state, shall pay an annual franchise tax to the State of Missouri equal to one-twentieth of one per cent of the par value of its capital stock and surplus employed in business in this state, and for the**

purposes of this article such corporation shall be deemed to have employed in this state that proportion of its entire capital stock and surplus that its property and assets in this state bears to all its property and assets wherever located: Provided, that this law shall not apply to corporations not organized for profit, nor to express companies, which now pay an annual tax on their gross receipts in this state, and insurance companies, which pay an annual tax on their gross premium receipts in this state: Provided, bank deposits shall be considered as funds of the individual depositor, left for safekeeping and shall not be considered in computing the amount of tax collectible under the provisions of this act. If this provision, exempting bank deposits shall be declared unconstitutional by the courts, then the Legislature hereby declares that it is the intention that the remainder of this act shall be in full force and effect and further declaring that it would have passed this act, irrespective of the said exempting provision (Laws 1921, Ex. Session, p. 122). (Emphasis ours.)

Sec. 9837. **Corporations to Make Report, to Whom—When—To Contain What.**—Every corporation liable to the tax prescribed in the foregoing section shall make a report in writing to the Missouri Tax Commission, if it is in existence, and if not, then to the State Board of Equalization annually on or before the first day of March, in such form as said Commission or said Board of Equaliza-

tion may prescribe. Such report shall be signed and sworn to before an officer duly authorized to administer oaths, by the president, vice-president, secretary, treasurer or general manager of the corporation and shall contain the following:

1. Name of corporation.
2. The location of its principal business office.
3. The names of its president, vice-president, secretary, treasurer, and members of the board of directors, with the residence and post office address of each.
4. The amount of authorized capital stock.
5. The amount of capital stock subscribed.
6. The amount of capital stock issued and outstanding.
7. The amount of capital stock paid up.
8. The par value of the stock.
9. The clear market value of the stock.
10. The amount of surplus and undivided profits on the 31st day of the preceding December, or on the last day of the preceding fiscal year of said corporation.
11. The nature and kind of business in which the corporation is engaged and the location of its place or places of business.
12. The clear market value of its property and assets in this state.
13. The clear market value of its property and assets without this state.
14. The clear market value of its total property and assets.
15. The amount of liabilities.

16. The change or changes, if any, in the above particulars made since the last annual report (Laws 1921, Ex. Session, p. 123).

Sec. 9838. **State Tax Commission to Determine Amount —State Auditor to Make Tax Bills, When—Taxes, When Due, Etc.**—The State Tax Commission, or the State Board of Equalization, as the case may be, shall, on or before the 20th day of March in each year, determine from the facts reported, and from any facts within or coming to its knowledge the proportion of the capital stock and surplus of each corporation employed in business in this state and the amount of tax each corporation is liable to pay under the provision of this article and shall report the same to the State Auditor, who shall make out a tax bill therefor against each corporation and shall deliver the same to the State Treasurer and charge him therewith. The taxes provided for in this article shall be paid on or before the 15th day of May in each year and shall be due and payable to the State Treasurer without notice, who shall make out and deliver a receipt therefor, which shall recite that the corporation named therein has paid its annual franchise tax under the provisions of this article for the year ending 31st day of the following December (Laws 1921, Ex. Session, p. 123).

Sec. 9842. **Taxes, to Be a Lien.**—The taxes and penalties to be paid by the provisions of this article shall be a first lien on all property and assets of the corporation within this state (Laws 1917, p. 237).

Sec. 9843. **Delinquents—How Collected—Penalty.**—If any corporation fails or refuses to pay the taxes assessed against it under the provisions of this article on or before the first day of June the State Treasurer shall certify a list of such corporations so delinquent to the Attorney-General, who shall proceed forthwith to collect the same, together with a penalty of twenty-five per cent and interest at the rate of one per cent per month. Suits for the collection of such taxes may be brought in the name of the state in any court of competent jurisdiction and any judgment rendered therein in favor of the state shall be a first lien on all property and assets of the corporation within this state (Laws 1921, Ex. Session, p. 125).

Sec. 9848. **Failure of Commission—State Board of Equalization to act.**—In the event that the State Tax Commission is not created or in existence all the powers and duties of such Commission under the provisions of this article shall devolve upon and be exercised and performed by the State Board of Equalization, and in such event the State Board of Equalization may employ such stenographic and clerical and other assistance as may be necessary to the proper carrying out of the provisions of this law (Laws 1917, p. 237).

APPENDIX B.

Stock Corporation Act (Laws Mo. 1921, pp. 661-666).

(Caption.)

An act authorizing stock corporations, other than building and loan associations, trust companies and corporations authorized by law to transact the business of banking or insurance, to make provisions, upon formation, reorganization, merger, or consolidation, for the issue of either or both preferred or common shares without nominal or par value; regulating the same and such corporations; and prescribing the method of determining the number of shares and capital of corporations issuing shares in such manner.

Act.

Section 1. **Stock corporations, other than building and loan associations, trust companies, etc.—shares, par value—capital.**—Upon the formation or reorganization, under the laws of this state from time to time in force, of any stock corporation, other than building and loan associations, trust companies and corporations authorized by law to transact the business of banking or insurance, or upon the merger or consolidation of two or more such corporations of this state with each other or any one or more of such corporations of this state with one or more such corporations of another state or states or of the United

States, provision may be made for the issue of shares of preferred stock of any or all classes, or common stock of any class, or both preferred and common stock, without any nominal or par value, by stating in the articles of association or certificate of incorporation or reorganization or in the joint agreement of merger or consolidation, in lieu of statements which may be prescribed by law as to the amount of the capital stock and the number and par value of shares into which it is divided:

(a) The number of shares with nominal or par value, and the number of shares without nominal or par value, that may be issued by the corporation, and the classes, if any, into which such shares are divided;

(b) The nominal or par value of shares of stock other than shares which it is stated are to have no nominal or par value;

(c) The amount of capital with which the corporation will begin business.

Sec. 2. **Amount of capital stock shall be fully paid in.**—No corporation authorized to issue shares of stock without nominal or par value in pursuance of the provisions of this act shall begin to carry on business, or shall incur any indebtedness, until the amount of the capital with which it will begin business stated in pursuance of section 1 of this act, shall have been fully paid in cash or in property.

Sec. 3. **Stated capital shall not include net profits or surplus earnings.**—For the purposes of this act the stated

capital (as that term is hereinafter used in this act) of a corporation issuing shares without nominal or par value shall be the capital with which the corporation will begin business increased by any net additions thereto, or diminished by any net deductions therefrom; but stated capital shall not include any net profits or surplus earnings until transferred to capital, and shall not be larger in amount than the excess, as shown by the books of the corporation, of its assets over and above its liabilities, other than liabilities on account of shares of stock issued or to be issued by such corporation. In the case of a corporation having outstanding shares with a nominal or par value, as well as shares without a nominal or par value, for the purpose of this act the portion of stated capital applicable to the shares without a nominal or par value shall be the excess of stated capital over and above the total par value of outstanding shares having a nominal or par value.

Sec. 4. **May be stated in dollars or cents per share.**—Preferences, rights, limitations, privileges, and restrictions may be stated in dollars or cents per share in respect to shares of stock issued in pursuance of the provisions of this act.

Sec. 5. **Authorized shares may be issued, when.**—Such corporation may issue and may dispose of its authorized shares having no nominal or par value, from time to time, for such consideration as may be prescribed or authorized in the articles of association or certificate of incorporation

or reorganization or the joint agreement of merger or consolidation, or, if not so prescribed, then for such consideration as may be fixed by the stockholders of such corporation at any annual meeting thereof or at any special meeting thereof duly called and held or by the board of directors acting under authority of such stockholders given in like manner.

Sec. 6. **Shares shall be deemed fully paid and nonassessable.**—Any and all shares without nominal or par value, issued for the consideration as prescribed or fixed in accordance with the provisions of section 5 of this act, shall be deemed fully paid and be nonassessable, and the holder of **such** shares shall not be liable thereon to the corporation or to its creditors.

Sec. 7. **Certificate shall plainly state, what.**—Every certificate for shares of stock without any nominal or par value shall have plainly stated upon its face the number of shares which it represents, and no certificate shall express any par value for such shares or any rate of dividend to which such shares shall be entitled in terms of percentage of any par or other value.

Sec. 8. **Dividends to be paid out of net profits and surplus earnings.**—No corporation having shares without nominal or par value, issued under the provisions of this act, shall declare or pay any dividend out of capital or out of anything except net profits or surplus earnings. In case any such dividends shall be declared or paid other

than from net profits or surplus earnings, the directors voting for such dividend shall be liable, jointly and severally, to such corporation, and to the creditors thereof, to the full amount by which such dividend shall have been paid out of capital.

Sec. 9. **Par value of shares to be stated.**—In any case in which it is otherwise required by law that the par value of the shares of a corporation be stated, but the shares of such corporation of any class are without nominal or par value, there shall be stated in lieu thereof in respect of such shares that such shares of such class are without par value; and when in any case the maximum or minimum amount of the capital stock of a corporation and its division into shares is required to be stated, but the shares of such corporation or any class are without nominal or par value, there shall be stated in lieu thereof the maximum or minimum amount of the capital stock of the corpoartion represented by shares having a par value and the division thereof into shares and the maximum and minimum number of shares without nominal or par value and that such shares are without par value. In any case, in which it is required by law that any action on the part of a corporation may be taken only with the authorization, consent or approval of its stockholders holding a specified amount or a specific fraction in amount of its capital stock, a share without nominal or par value shall be considered the equivalent of a share having a nominal or par value of one hundred dollars.

Sec. 10. **Corporation may increase or reduce number of shares.**—Any corporation having shares without any nominal or par value in pursuance of this act, may increase or reduce the number of shares which it may issue, in the manner now provided by law for the increase or reduction of the capital stock of a similar corporation having shares with a par value.

Sec. 11. **Shares of stock to be deemed part of aggregate capital of corporation.**—Except as to any preferences, rights, limitations, privileges and restrictions, lawfully granted or imposed with respect to any stock or class thereof, shares of stock without nominal or par value shall be deemed to be an aliquot part of the aggregate capital of the corporation issuing the same and equal to every other share of stock of the same class.

Sec. 12. **Taxes to be paid—how computed.—For the purpose of computing any organization taxes required to be paid under the laws of this state, and such tax or taxes, if any, the determination of which is based on the par value of shares of stock and not on the number of shares or the actual or ascertained value thereof and for the purpose of any statutory provision limiting the relation between indebtedness and capital stock, each share of stock without any nominal or par value, under the provisions of this act, shall be considered the equivalent of a share having a nominal or par value of one hundred dollars.** For the purpose of any report, return, or similar instrument

wherein the amount or par value of stock or capital or capital stock, paid in, outstanding, or retired, is required to be stated, in the case of shares without nominal or par value, and with respect to such shares, the amount or par value thereof, outstanding or paid in prior to the date of such report, return or similar instrument, shall be considered as the amount of stated capital in excess of the total par value of outstanding shares having a par value, if any, and the amount or par value thereof retired shall be considered as the amount of decrease, if any, of stated capital due to such retirement. In the case of shares without nominal or par value presently to be issued, in lieu of stating the amount or par value thereof in any such certificate, report, return, or similar instrument, a description of the consideration received or to be received therefor, or of the assets received or to be received for which the proceeds from the disposition of the said shares are to be used to pay or reimburse the treasury of the company, and the net changes, if any, in the corporations' stated capital, due to the receipt of such consideration, shall be stated. In the case of shares without nominal or par value authorized but unissued and not presently to be issued, it shall not be necessary, in such report, return, or similar instrument, to show the amount or par value thereof, and only the number thereof need be stated. For the purpose of any statutory provision limiting the amount of capital stock which a corporation may have, or prescribing the portion or amount or par value of stock

or capital which must be subscribed or paid in cash or otherwise, whether at the time of formation, before commencing to do business, or from time to time subsequent thereto, the stated capital of a corporation having shares without nominal or par value, shall be deemed to be its capital stock or the amount thereof. Nothing in this act contained shall be construed as excepting or relieving a corporation from any requirement of law as to the amount in dollars of subscribed or paid-in capital, in cash or otherwise, which it must have at any time. In any investigation or proceeding to determine the value of the property, assets, or capital stock of a corporation having shares without nominal or par value under the provisions of this act, neither the stated capital of such corporation nor the number of shares of its outstanding stock without nominal or par value shall be controlling, but the same may be disregarded, or considered only to such extent as shall be necessary or proper for the purpose of such investigation or proceeding. (Emphasis ours.)

Sec. 13. **Laws applicable to corporation provided by act.**—Except as otherwise provided by this act, corporations issuing shares without any nominal or par value, under the provisions hereof, shall be and remain subject to the laws of this state, now or hereafter in force, relating to the formation, regulation, reorganization, consolidation, or merger, rights, powers, and privileges of such corporations, and all other laws applicable thereto.

Sec. 14. **Acts or parts of acts inconsistent repealed.**—All acts or parts of acts providing for the incorporation, organization, administration and management of the affairs of corporations or otherwise, and inconsistent with this act, are, as respects corporations having shares without nominal or par value, hereby repealed, but all such acts or parts of acts are in all other respects, as respects corporations having shares without nominal or par value, expressly continued in full force and effect.

Sec. 15. **Act does not limit jurisdiction of Public Service Commission.**—Nothing in this act shall be construed in any way to limit the jurisdiction of the Public Service Commission under the Public Service Commission Act over the issue by public utilities of shares of stock without nominal or par value pursuant to this act.

Approved April 12, 1921.